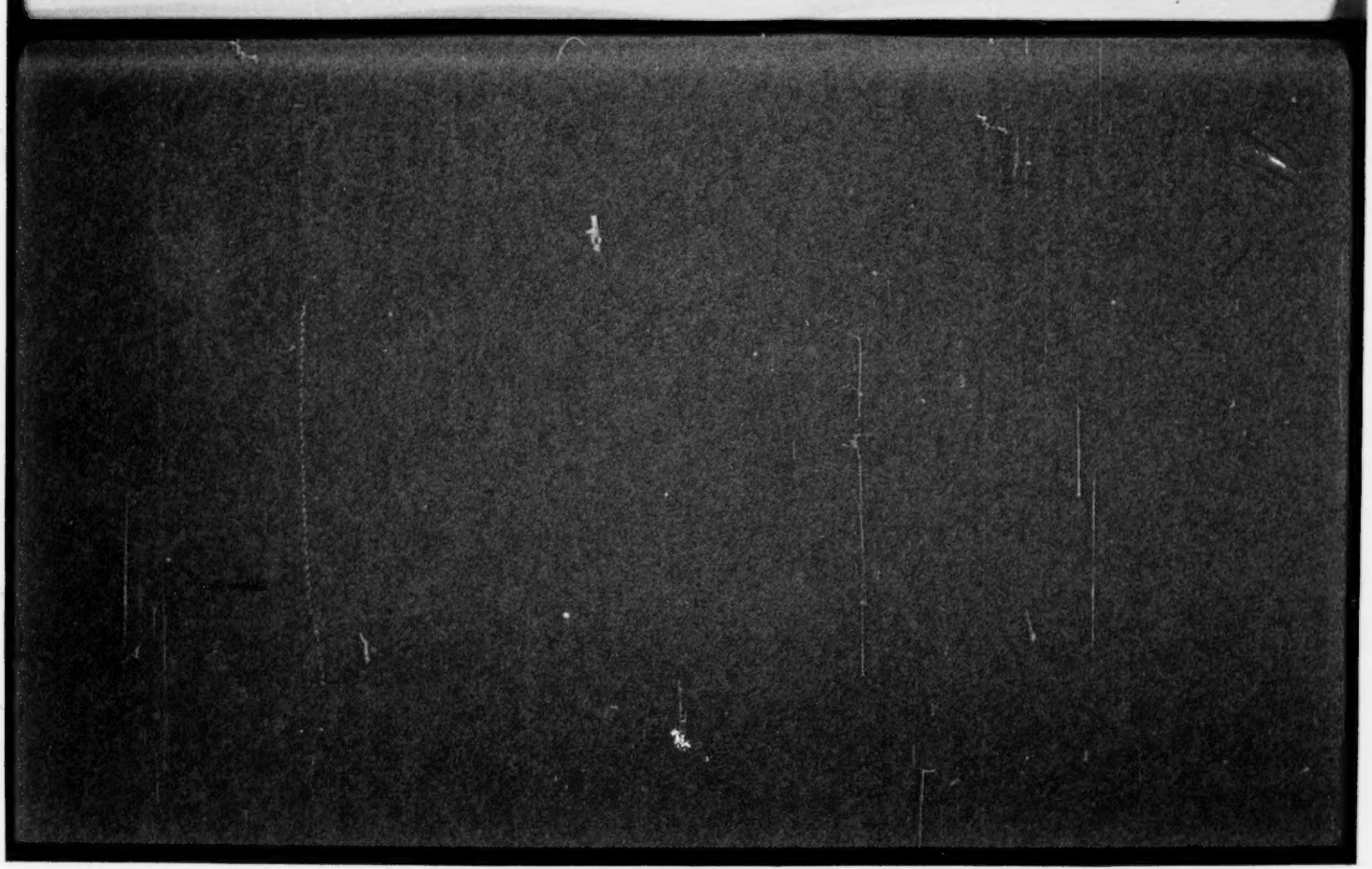

APPENDIX A

Statutes

Section 303(a) of Title 50, Appendix, United States Code, (Section 3a of the Selective Training and Service Act of 1940) pertaining to exemption of neutral aliens from military service, reads in part as follows:

> (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and forty-five, at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States; Provided, That any citizen or subject a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: . . .

Regulations

The following regulations were effective February 7, 1942, 7 Fed. Reg. 855:

> 32 C.F.R. 611.12. *When a nondeclarant alien is residing in the United States.* Every male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States, unless he is in one of the categories specifically excepted by the provisions of 611.13 is a "male person residing in the United States" within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended.
>
> 32 C.F.R. 611.13. *When a nondeclarant alien is not residing in the United States.* (a) A male alien who is now in or hereafter enters the United States who has

not declared his intention to become a citizen of the United States is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended:

* * * * *

(6) If he has entered or hereafter enters the United States in a manner prescribed by its laws and does not remain in the United States after May 16, 1942, or for more than 3 months following the date of his entry, whichever is the later.

(b) When a male alien who has not declared his intention to become a citizen of the United States has entered or hereafter enters the United States in a manner prescribed by its laws and remains in the United States after May 16, 1942, or for more than 3 months following the date of his entry, whichever is the later, he is a "male person residing in the United States" within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended, unless he has filed an Alien's Application for Determination of Residence (Form 302) in the manner provided in 611.21 and such application is either (1) pending or (2) has resulted in a determination that he is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, in either of which events he shall not be considered as a "male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, during the period when such application is pending or during the period covered by the Alien's Certificate of Nonresidence (Form 303) issued to him as a result of the determination that he is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended. (54 Stat. 885; 50 U.S.C., Supp. 301-318, inclusive; E.O. No. 8545, 5 F.R. 3779).

Effective January 17, 1946, the above paragraph 6 was

renumbered and amended to read as follows (*Problems of Selective Service,* 1952, Appendices A-C, pp. 35-36):

> (7) He has, within the time prescribed and in the manner provided in section 611.21, filed with the local board with which he is registered, or if he is not registered, with the local board having jurisdiction over the area in which he is located, an Alien's Application for Determination of Residence (Form 302), together with an Alien's Personal History and Statement (Form 304) and such application is either pending or has resulted in the issuance by the local board of an Alien's Certificate of Nonresidence (Form 303) which has not expired.
>
> 32 C.F.R. 611.21. *What aliens may apply for a determination.* Any nondeclarant alien who has entered or who hereafter enters the United States * * * may file with his local draft board * * * an Alien's Application for Determination of Residence (Form 302); *Provided,* That such application is filed within three months after the date of his entry into the United States or within three months after persons of his age become liable for training and service by law, whichever is the later; *And provided further,* That such application is filed prior to induction * * *[2]

Effective June 27, 1945 (10 F.R. 7906), Section 611.21-1 was added (*Problems of Selective Service,* 1952, Appendices, A-C, p. 37), reading as follows:

> *Application filed after 3 months.* Any alien who has not complied with the provisions of section 611.21 or section 611.26 may file an Alien's Application for Determination of Residence (Form 302) and an Alien's Personal History and Statement (Form 304) with a local board for transmittal to the Director of Selective Service for consideration.
>
> 32 C.F.R. 611.22. *Determination by local board.* (a) As soon as possible after an alien who is entitled to do so files with the local board an Alien's Application for

[2] Originally this section, promulgated in 1942 (7 F.R. 2084) required a claim of non-residence to be filled prior to May 16, 1942 for those here before February 16, 1942. The section was amended to read as noted in the text in 1943 and republished in the same form again in 1945.

> Determination of Residence (Form 302), together with an Alien's Personal History and Statement (Form 304), the local board shall determine whether such alien is "a male person residing in the United States" within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended.

Effective March 16, 1942, as amended on September 14, 1942, 32 C.F.R. 611.29(b) provided as follows (*Problems of Selective Service*, 1952, Appendices A-C, p. 40):

> Notwithstanding any other provisions of these regulations, whenever the Director of Selective Service is satisfied that a non-declarant alien is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, he may issue or authorize the issuance of an Alien's Certificate of Nonresidence (Form 303) to such nondeclarant alien.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12839

MEHMET SABAHITTIN GIZ, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General of the United States, APPELLEE

Appeals from the United States District Court for the District of Columbia

Decided December 13, 1956

Before BAZELON, DANAHER and BASTIAN, Circuit Judges.

BAZELON, *Circuit Judge:* Section 3(a) of the Selective Service Act of 1950, 50 U.S.C. App. § 303(a) (1946), makes all aliens "residing in the United States" liable for military service. It provides, however, that any citizen of a neutral nation may be relieved from service upon application

(Form DSS-301), and that persons thus relieved will thereafter be barred from citizenship. Regulations 611.21 (32 C.F.R. 611.21) promulgated thereunder provided for determination of non-residence upon filing application (Form DSS-302) within three months after date of entry or after becoming liable for service, whichever was later. This was supplemented by 611.21-1 (32 C.F.R. 611.21-1) on June 27, 1945, permitting application to be filed after three months.

In these three cases, appellants, Turkish citizens who were in the United States pursuant to student non-immigration visas under § 4(e) of the Immigration Act of 1924, claimed draft exemption as neutral aliens. Under § 212(a)(22) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(a)(22) (1952), persons ineligible for citizenship are ineligible for permanent entry immigration visas. The Board of Immigration Appeals in deportation proceedings, ruled that appellants were ineligible for citizenship by reason of their claims for draft exemption and ordered their departure. Appellants challenged this administrative action in these declaratory judgment suits. Judgments were allowed against them.[1] These appeals followed.

* * * * *

No. 12839

Appellant Giz entered the United States in 1939 on a student's visa and remained in a lawful student status until July 21, 1945. In 1940 he registered with his local draft board. He claimed draft exemption December 31, 1942. In June, 1944, however, he filed an application for a determination of non-residence. Notwithstanding his failure to file within the time prescribed by the regulations then in effect, the draft board considered the application on its merits before denying it.

My colleagues are of the view that, notwithstanding such consideration, Giz's status, like that of the other two appellants, as an alien "residing in the United States" may be taken as confessed for the purpose of § 3(a) of the Selective Service Act. This view, with

[1] In Nos. 12873 and 13043 by summary judgment; in No. 12839 after trial.

(Footnote 2 of this opinion is omitted in reprinting.)

which I disagree, is fully stated in Judge Danaher's separate opinion herein. For reasons noted in the footnote,[3] I would reverse and remand for further administrative proceedings.

As another ground for avoiding the bar of ineligibility, Giz alleges that he claimed draft exemption under mistake. He says that he signed the claim for exemption at the request of the chief clerk of the draft board and hence did not have the " 'opportunity to make an intelligent election' between being subject to the draft on the one hand, and being exempt but losing the right to become a citizen on the other." *Machado* v. *McGrath*, 90 U.S. App. D.C. at 74, 193 F.2d at 709, citing *Moser* v. *United States*, 341 U.S. 41 (1951). We find no basis in this record for disturbing appellee's adverse factual determination. See *Mannerfrid* v. *United States, supra.* (200 F. 2d 730).

No. 12873 affirmed.
No. 13043 affirmed.

DANAHER, *Circuit Judge*, with whom Circuit Judge Bastian concurs: We concur in Judge Bazelon's opinion as to No. 12873—*Gurcay* v. *Brownell* and No. 13043—*Moran* v. *Brownell*. We agree with Judge Bazelon's disposition of

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[3] Although Giz's application was filed late, it was considered on its merits. Hence the regulations' timely filing requirements must be deemed to have been waived. And this accords with Selective Service policy followed even before the time for filing was extended by supplementation of the regulations in 1945. See *Problems of Selective Service* (1952) Text p. 107 and Appendices A-C p. 40; and 32 C.F.R. 611.29(b).

From all that appears in this record, in passing on the merits of the application the Director of Selective Service based his determination that appellant was "residing in the United States" solely upon his lawful status as a temporary student visitor. On that basis, I think the Supreme Court's decision in *McGrath* v. *Kristensen*, 340 U.S. 162 (1950), especially the concurring opinion of Mr. Justice Jackson, requires us to hold that determination erroneous as a matter of law. Such an error, in my view, does not bind the Immigration Service. *Ex parte Ghosh*, 58 F. Supp. 851 (S.D. Cal. 1944).

But I do not think this concludes the matter. For even as to an alien in the United States on a student's visa, there may be other circumstances showing a purpose to reside here. The Immigration Service should have the opportunity of determining whether such circumstances exist here. To that end I would reverse and remand to the District Court with directions to refer the case back to the appellee for further administrative proceedings.

the claim by Giz that he sought "draft exemption under mistake." As to the other aspects of the question presented in No. 12839—*Giz* v. *Brownell*, we prefer to state our position as will be developed.

Giz, a citizen of Turkey, entered the United States on September 9, 1939, as a student. After studying English in Massachusetts, he entered the University of California as a pre-dental student. In 1940 he registered with the local draft board at Berkeley, California. He was graduated from the University in October 1944 with a degree in dentistry and thereafter took a postgraduate course in dental surgery. His visa expired in July 1945, after he had completed his studies and had concluded his professional examination. He did not seek an extension of his visa nor did he depart from the United States. Instead, he moved to San Diego, California, and opened an office for the practice of dentistry. In 1947 deportation proceedings were instituted because Giz had overstayed his visa. After several hearings, and a determination that Giz should be excluded from admission to the United States, he appealed to the Board of Immigration Appeals. The Board held that Giz was statutorily ineligible for citizenship and, accordingly, ineligible for suspension of deportation. Although he was granted voluntary departure, he filed an action for declaratory relief claiming, notably, that he had not been "residing in" the United States within the meaning of § 3(a) of the Selective Training and Service Act of 1940.[1] After trial and oral argument, Judge McGuire entered findings of fact and conclusions of law and ordered judgment for the defendant. Thereupon, Giz appealed.

The Selective Training and Service Act of 1940 by § 3(a) required the registration of every male citizen of the United States and every other male person "residing in the United States." It provided further that, despite registration, a citizen of a neutral country was to be relieved from liability for service upon his making application for such relief "in accordance with the rules and regulations prescribed by the President." Any such person who filed such an application by statute was thereafter "debarred from becoming a citizen of the United States." The

[1] 54 STAT. 885 (1940), as amended, 55 STAT. 845 (1941), 50 U.S.C. App. 303(a) (1946).

Act did not define who was a male person "residing in" the United States.

The Regulations as promulgated have been found to be valid.[2] Section 611.12[3] prescribed "when a non-declarant alien is residing in the United States." Since Giz had not declared his intention to become a citizen of the United States, pursuant to the statute and to this regulation, without more, he was deemed to be "residing in" the United States[4] unless he fell into an excepted category as provided by § 611.13.

Pursuant to the Regulations,[5] Giz could have been deemed not to be "residing in the United States" if, by May 16, 1942, he had filed an Alien's Application for Determination of Residence on Form 302. But he filed no such application by May 16, 1942. Indeed, not until May 31, 1944, did he file Form 302. Thus, as we are saying concerning Gurcay and Moran, the status of Giz as an alien "residing in the United States" must be taken as confessed for the purposes of § 3(a) of the Selective Training and Service Act and of the Immigration and Nationality Act.[6] But the law and the circumstances determining his status for the purposes of this case do not stop there.

From 1940 on, having registered as he was bound to do, Giz was charged with notice as to the requirements of the law. It was "incumbent upon him to keep informed of any conditions attached to any claim for exemption before he undertook to press one."[7] Yet, ten months after the promulgation of the Regulations, and seven months after his status had already become fixed, he filed, *not* Form 302, but Form 301. Although he was already classified 4-C as a citizen of a neutral country, he asked for complete ex-

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[2] *Mannerfrid* v. *United States*, 200 F. 2d 730, 732 (2d Cir. 1952), *cert. denied*, 345 U.S. 918 (1953); cf. *McGrath* v. *Kristensen*, 340 U.S. 162 (1950), where the Court did not pass on the validity of the regulations set forth at p. 173 note 19, since they were not effective when Kristensen filed his application for relief.

[3] 32 C.F. R. § 611.12.

[4] *Mannerfrid* v. *United States*, *supra* note 2; cf. *Benzian* v. *Godwin*, 168 F. 2d 952 (2d Cir. 1948), *cert. denied*, 335 U.S. 886 (1948), modified in part by *McGrath* v. *Kristensen*, *supra*, note 2.

[5] § 611.13(a)(6).

[6] *Mannerfrid* v. *Brownell*, —— U.S. App. D.C., ——, —— F. 2d —— (D.C. Cir. October 18, 1956).

[7] *Mannerfrid* v. *United States*, *supra* note 2, 200 F. 2d at 732.

emption from military service. On December 31, 1942, he signed and filed with the local draft board his application containing the statement:

> "I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, in accordance with the Act of Congress, approved December 20, 1941. *I understand that the making of this application to be relieved from such liability with debar me from becoming a citizen of the United States.* I have not filed a declaration of intention to become a citizen of the United States." (Emphasis supplied.)

He brought himself squarely within the provision of § 3(a) of the Selective Training and Service Act, and thereby he became "debarred from becoming a citizen of the United States." He not only sought and received the benefits and the protection of life in the United States, he pursued and completed his professional education while tens of thousands of others responded to the nation's wartime needs. But not Giz. It is possible to conclude, irrespective of the Board of Immigration Appeals, that, without regard to any other consideration whatever, he intended to remain safe and secure while carrying out his own purposes. Even when his visa had expired, he moved to a different city and opened an office for the practice of his profession. Indeed, when applying for suspension of deportation in 1950, he claimed he had resided in the United States for more than seven years and was so residing on July 1, 1948. Quite apart from differing connotations of legal definitions of "residing," the continuing purpose of Giz throughout the past seventeen years seems clear enough, and the fact is that he is still here.

But the courts have now been asked to say that he was a non-resident. We are asked to decide that his case differs from those of Gurcay and Moran because, as of May 31, 1944, he filed an application for Determination of Residence, Form 302. We do not understand the reference to a "waiver" in terms of a timely filing. Although Giz had already forfeited his non-resident status, if he had one up to May 16, 1942, just as did Gurcay and Moran, the

Director nonetheless gave Giz the benefit of consideration. Giz actually, by the additional consideration of his case, received more, not less, than was his due. We see no basis here upon which it can be urged that Giz was harmed on that account, or that he was treated any differently than was warranted by the facts and the law. "In all cases where an application was not filed within the 90 days, the Director of Selective Service determined whether or not the alien was 'residing in the United States.' In such connection, he also had the authority to cancel the registration of any nondeclarant alien and to issue or authorize the issuance of an Alien's Certificate of Non-residence (DSS Form 303)."[8] The director affirmed in 1944 what the law had already determined, that Giz had been a resident for the purposes of the Act, and a Certificate of Non-residence was denied.[9] Thereafter, Giz, on July 11, 1944, was classified as a medical student, and he remained deferred throughout the war.

No neutral alien was compelled to serve in our military forces, but when Giz claimed relief from such service because he was a neutral alien, Congress said that he was not to become a citizen of the United States in the future. To us it seems that Giz comes squarely within the interdiction.

The order of the District Court in No. 12839 is

Affirmed.

JUDGMENT—(Filed December 13, 1956)

This cause came on to be heard on the record from the United States District Court for the District of Columbia and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court

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[8] U.S. Selective Service System, *Problems of Selective Service*, Vol. 1, p. 107 (1952).

[9] *Ex parte Ghosh*, 58 F.Supp. 851 (S.D. Cal. 1944), is clearly distinguishable, for Ghosh, a Hindu, was on that account ineligible to become a citizen of the United States. Not being entitled to be either a citizen or a permanent resident, Ghosh would have been in the United States unlawfully unless he was here only temporarily as a visitor; cf. *Estep* v. *United States*, 327 U.S. 114, 121 (1946); and see U.S. Selective Service System, *Problems of Selective Service*, Vol. 2, pp. 134-143 (1952).

appealed from in this cause be, and the same is hereby, affirmed.

Dated: December 13, 1956.

Per Circuit Judge Danaher.

Circuit Judge Bazelon, for the reasons noted in his opinion this day filed herein, would reverse the judgment and remand the case to the District Court with directions to refer the case back to the appellee for further administrative proceedings.

(4089-9)